



Determination 2013/024

Regarding the refusal to issue a code compliance certificate for 10-year-old alterations and additions to a house at 56 West End Road, Ohope



1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are

- the owner of the building, L England (“the applicant”)
- Whakatane District Council (“the authority”), carrying out its duties as a territorial authority or a building consent authority.

1.3 This determination arises from the authority’s decision to refuse to issue a code compliance certificate. The authority does not consider the work complies with Clause E2 of the Building Code² (First Schedule, Building Regulations 1992).

1.4 The matter to be determined³ is therefore whether the authority correctly exercised its powers in refusing to issue the code compliance certificate. In making this decision, I must consider:

- the grounds on which the authority based its decision to refuse to issue the code compliance certificate, and

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² In this determination, unless otherwise stated, references are to sections of the current Act and references to clauses are references to the Building Code

³ Under sections 177(1)(b) and 177(2)(d) of the current Act

- whether the completed building work complies with the relevant provisions of Clauses B2 Durability and E2 External moisture of the Building Code that was current at the time the building consent was issued.

1.5 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute (“the expert”), and the other evidence in this matter.

1.6 The relevant sections of the current Act are set out in Appendix A.

2. The building work

2.1 The building work in question consists of extensive alterations and additions (“the alterations”) to a free-standing, two-storey house situated on a generally level site. The site is in high wind and exposure zones for the purposes of NZS 3604⁴.

2.2 The existing house and extensions are timber-framed, with the existing structure supported on a piled foundation, and the new lounge extension built over a concrete slab supported by blockwork foundation walls. The completed building is relatively simple shape in plan and form, but with some complex features.

2.3 The roof is clad with newly-painted profiled steel, and new parapets have been added to the upper roof and the lower north and east elevations. Elsewhere, there are 300mm projecting eaves. A new skylight has been installed in the roof over the dining room.

2.4 The exterior walls are generally lined or re-lined with two types of texture coated fibre-cement claddings that are directly fixed to the wall framing. Some decorative polystyrene panels have been added to the balustrades and parapets. The expert is of the opinion that the exterior wall framing is unlikely to be treated. The external joinery is of a powder-coated aluminium.

2.5 The existing upper level north elevation timber-framed balcony has been extended, and the deck is covered with a membrane lining over a plywood substrate. The extended balcony now has a curved balustrade, lined with texture coated fibre-cement linings.

2.6 The separate garage has also been altered. It now has new linings that match those of the house, additional roof parapets, and two new tilting garage doors. The building consent does not include reference to alterations to the garage, though it appears the work may have been carried out at the same time as alterations to the house.

2.7 I note here that regardless of whether the alterations to the garage were consented building work, the building work is still required to comply with the Building Code. Given the lack of clarity as to the garage alterations being part of the consented work I have retained comment on the compliance of the building work but have not included it in my decision on the code compliance certificate. I leave the matter of the garage alterations for the parties to resolve in due course.

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

3. Background

- 3.1 The authority issued building consent No. 10390 for the alterations on 3 July 2002 under the Building Act 1991 (“the former Act”). I have not been supplied with any information that indicates when the construction took place.
- 3.2 Following a request from the applicant, the authority carried out a final inspection of the building work on 23 November 2011. The authority emailed the applicant on 24 November 2011 noting that the inspection had taken place and that the authority was unable to issue a code compliance certificate because it was not satisfied that the building work complied with the requirements of the Building Code. The main area of concern related to the weathertightness of the exterior cladding, in particular:
- the cracking evident in the cladding sheet joints
 - the water marks between the cladding joints
 - the suitability of the exterior paint system
 - the lack of cladding control joints.
- 3.3 In an email to the authority dated 25 November 2011, the applicant stated that:
- the cladding included the correct proprietary jointing as required by the manufacturer and the cracks that were observed ‘as you would expect with a flexible system’
 - ‘any moisture present at the joints will seep downwards and not inwards’
 - the paint system was that recommended by its manufacturer. A more flexible coating would be applied next time the cladding required re-painting.
 - the cladding as installed was considered flexible so specific control joints were not required.
- 3.4 The authority responded in an email dated 5 December 2011, stating that based on what had been observed, the authority could not be satisfied on reasonable grounds that the building work met the performance requirements of Clause E2.
- 3.5 In a further email to the authority dated 17 October 2012, the applicant reiterated the comments made previously. The applicant had spoken with one of the two qualified builders involved in the construction of the alteration, who was willing to meet with the authority to try to solve the outstanding issues.
- 3.6 The Ministry received an application for a determination on 20 December 2012 but without any supporting information which was received on 25 January 2013.

4. The submissions

- 4.1 The applicant did not make a formal submission in support of the application but provided:
- some of the consented plans
 - the building consent
 - some of the authority’s inspection documentation
 - correspondence with the authority.

- 4.2 The authority did not make a formal submission in response to the application.
- 4.3 A draft determination was issued to the parties for comment on 11 April 2013.
- 4.4 The applicant responded to the draft on 24 April 2013; accepting the decision but submitting that
- the garage was not discussed or included within the ‘scope of inspection’ and should not be included in the determination; though the applicant acknowledged the moisture ingress and agreed rectification was required
 - the deterioration beneath the skylight is the result of moisture from the kitchen, it has been evident for many years and ‘has not deteriorated further’.
- 4.5 The authority accepted the draft in a response received on 17 April 2013. In a further email on 24 April 2013 the authority commented on the applicant’s response to the draft, noting that (in summary):
- It should be clearly established whether building work to the garage was undertaken under consent BC10390. A visual assessment indicates that it was done at the same time; however if it has not altered since its origin construction in 1995/96 then it should not form part of the determination (nor the code compliance certificate being considered).
 - The authority has not investigated the skylight and can make no comment on its compliance or cause of deterioration.

5. The expert’s report

- 5.1 As described in paragraph 1.5, I engaged the services of an expert, who is a registered building surveyor, to assist me. The expert examined the house on 19 March 2013 and produced a report completed on 22 March 2013. A copy of this report was forwarded to the parties on 2 April 2013.

5.2 General

- 5.2.1 The report described the house in general terms and gave some of the background to the matter in dispute. In the expert’s opinion, there was a lack of compliance with the cladding manufacturer’s instructions and with the consented details, and this had impacted on the weathertightness of the building. While external re-decoration was overdue, the expert considered the building was generally well maintained.
- 5.2.2 The expert noted the following differences between the fitout as constructed and the consented plans:
- Only one of the two consented dining room skylights had been installed.
 - Fibre-cement cladding had been installed to the new parapets in lieu of the consented polystyrene cladding.
 - Flat metal cappings had been installed to the top of the balcony balustrades.
 - The balcony handrails are now side-fixed instead of top-fixed.
 - The overflashing detailed at the base of the cladding had not been installed as detailed.

- The alterations made to the garage were not indicated on the consent documentation. (Refer also paragraphs 2.7, 4.4 and 4.5.)

5.3 Moisture testing

5.3.1 The expert carried out invasive moisture measurements at locations around the building and recorded the following elevated moisture levels indicating water ingress.

- 20% at the flooring at the east end of the back door.
- 23% at the north balcony plywood substrate below northeast corner of deck.
- 30% at the flooring at the west end of the back door.
- 39% at the laundry flooring.
- 46% at the floor framing at the west end of the back door.
- 93% in wall framing (not original) at the south end of the garage door.

5.3.2 The expert removed sections of the cladding to check on the construction of the cladding. I am prepared to accept that the evidence obtained at these locations would be typical of other similar details throughout the cladding.

5.3.3 The expert also observed the following areas of damage:

- decayed framing at the bottom plate level on the south elevation
- decayed original framing in the garage
- damaged plasterboard linings below the west end of the kitchen skylight.

5.4 Code compliance

5.4.1 The expert examined various elements of the house and I summarise the expert's comments below:

Clause B2 – Durability

- Decayed framing and elevated moisture readings (see paragraph 5.3) indicated failure to comply with Clause B2.

Clause E2 – External moisture

- There was insufficient clearance between the base of the cladding and the adjoining paving at some locations.
- The metal base flashing had been faced fixed.
- There were vertical cracks evident in the cladding and at the junctions of the cladding with the decorative polystyrene decorative panels.
- The front flanges of the vertical cladding joint flashings had been cut off and the joints had been plastered without any reinforcing, leaving them vulnerable to cracking and water entry. No waterproof backing strips had been installed.
- The un-reinforced butted cladding joints to the balustrade at the east end of the balcony had been poorly formed and were vulnerable to leaking.

- There was a hole through the cladding at the end at the west elevation head flashing.
- The sloping paving adjacent to the garage was directing water into it and there was inadequate threshold clearance at the garage doors.
- The kitchen skylight was leaking.

6. Discussion

- 6.1 I consider the expert's report clearly establishes that the current performance of the building envelope is not adequate because there is evidence of moisture penetration and damage of the building elements. Consequently, I am satisfied that the alterations do not comply with Clause E2 of the Building Code.
- 6.2 In addition, the building is required to comply with the durability requirements of Clause B2. Clause B2 also requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the buildings to remain weathertight. Because the cladding faults on the alterations will continue to allow the ingress of moisture in the future and as there is already damage and decay present in some areas of the framing, I consider that the alterations do not comply with Clause B2.
- 6.3 Given the non-compliance with Clause E2, the likelihood of a lack of treatment to the external framing, and the expert's limited investigation, the building's current and ongoing compliance with Clause B1 should be considered in any further investigation. The rectification of the building will require careful investigation into the causes, extent, and significance of moisture ingress, and the possible effects on the building's structure.
- 6.4 Given the above, I am satisfied that the alterations do not comply with the Building Code that was current at the time the consent was issued, and taking into account section 436 of the current Act that based on this conclusion, the authority made the appropriate decision when it refused to issue the code compliance certificate.

7. What happens next?

- 7.1 I consider the authority has given notice under section 95A giving its reasons for declining the code compliance certificate. The authority may issue a notice to fix under section 164 to require the owner to bring the building into compliance with the Building Code. The notice to fix should identify the breaches of the Building Code noted herein and refer to any further defects that might be discovered in the course of investigation and rectification. The notice should not specify how the defects are to be fixed: that is a matter for the owner to propose and for the authority to accept or reject.
- 7.2 I have taken into account the applicant's submission in regard to the kitchen skylight; however, I consider the evidence provided by the expert indicates that it is likely that the skylight is leaking and that this should be investigated further as part of the remedial work to be carried out to bring the house into compliance with the Building Code.

- 7.3 The owner should produce a detailed proposal describing how the defects are to be remedied and this should be submitted to the authority for approval. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 7.4 I also note that the expert has identified changes from the consent drawings, and I leave these to the parties to resolve once the appropriate remedial work is satisfactorily completed.

8. The Decision

- 8.1 In accordance with section 188 of the Building Act 2004, I determine that:
- the authority correctly exercised its powers when it refused to issue the code compliance certificate for consent No. 10390, and
 - the house does not comply with Clauses B2 and E2 of the Building Code that was current at the time the building consent was issued.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 May 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Building Act 2004

436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
 - (a) remains in force as if this Act had not been passed; but
 - (b) must be read as if—
 - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
 - (ii) section 43(4) were omitted.